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In the Supreme Court of the United States

OCTOBER TERM, 1996

BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND, PETITIONER

v.

FERBAR CORPORATION OF CALIFORNIA, INC., AND STEPHEN BARNES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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36 pp

QUESTION PRESENTED

Whether the statute of limitations for an action to collect withdrawal liability under Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1451(f), begins to run on the date an employer withdraws from a pension plan or instead on the date the employer fails to make a scheduled withdrawal liability payment.

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INTEREST OF THE UNITED STATES

The Pension Benefit Guaranty Corporation (PBGC) is the federal agency responsible for administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301 *et seq.*, including the provisions added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208. PBGC has an interest because this case requires an interpretation of 29 U.S.C. 1451(f), which governs the time for filing a civil action under MPPAA. As we explained in our amicus brief at the petition stage (at 11, 14-15), the date on which the statute of limitations begins to run under 29 U.S.C. 1451(f) for an action to collect withdrawal liability has significant ramifications for the administration of multiemployer plans. In addition, PBGC has an interest in this case because petitioner is an insolvent multiemployer pension plan entitled to receive financial assistance from PBGC under 29 U.S.C. 1431. If

petitioner prevails in this litigation, the PBGC's obligations under 29 U.S.C. 1431 could be reduced.

STATEMENT

1. Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), an employer that withdraws from a multiemployer pension plan is required to pay "withdrawal liability," calculated pursuant to one of four statutory methods for determining the employer's allocable share of the plan's unfunded vested liabilities. 29 U.S.C. 1381, 1391. Withdrawal liability protects the financial stability of multiemployer plans and the retirement income of millions of participants by requiring withdrawing employers to pay a "proportionate share of the plan's 'unfunded vested benefits.'" *Connolly* v. *PBGC*, 475 U.S. 211, 217 (1986) (quoting *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 725 (1984)). By requiring withdrawing employers to pay their fair "share of the plan obligations," *Connolly*, 475 U.S. at 225, Congress ensured that those obligations would not fall on the remaining employers, and thereby discourage new employers from joining the plan or encourage existing employers to withdraw. *Gray*, 467 U.S. at 721-723. Withdrawal liability is thus the cornerstone of Congress's efforts to protect multiemloyer plan participants against benefit losses.

A "complete withdrawal" from a multiemployer pension plan generally occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. 1383(a).[1] When an employer withdraws from a multiemployer plan, MPPAA requires the plan sponsor (usually a joint labor-management board of trustees, 29 U.S.C. 1002(16)(B)) to "(1) determine the amount of the employer's withdrawal liability, (2) notify the employer of the amount of the withdrawal liability, and (3) collect the amount of the withdrawal liability from the employer." 29 U.S.C. 1382.

[1] An "obligation to contribute" may arise "under one or more collective bargaining (or related) agreements" or "as a result of a duty under applicable labor-management relations law." 29 U.S.C. 1392(a).

"As soon as practicable" after an employer's complete withdrawal, the plan sponsor must notify the employer of "the amount of the liability" and "the schedule for liability payments," and must "demand payment in accordance with the schedule." 29 U.S.C. 1399(b)(1).[2] The schedule must amortize the amount of withdrawal liability in "level annual payments" in accordance with a statutory formula, based roughly on the employer's previous annual contributions to the plan. 29 U.S.C. 1399(c)(1)(A)(i) and (C)(i). For amortization periods that exceed 20 years, the employer's liability usually is limited to the first 20 annual payments. 29 U.S.C. 1399(c)(1)(B) and (D). Each annual payment, in turn, "shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules." 29 U.S.C. 1399(c)(3). The Act also permits the employer "to prepay the outstanding amount of the unpaid annual withdrawal liability," plus any accrued interest. 29 U.S.C. 1399(c)(4). See *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995).

Within 90 days after the employer receives the plan sponsor's notice and demand for payment, the employer is entitled to ask the plan sponsor "to review any specific matter relating to the determination of the employer's

[2] MPPAA also imposes withdrawal liability following an employer's "partial withdrawal." 29 U.S.C. 1381, 1386, 1388(d), 1399(b)(1). Generally, a partial withdrawal occurs on the last day of a plan year if for such plan year "there is a 70-percent contribution decline" or "there is a partial cessation of the employer's contribution obligation." 29 U.S.C. 1385(a).

liability and the schedule of payments." 29 U.S.C. 1399(b)(2)(A). The employer may also "identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer," and "furnish any additional relevant information to the plan sponsor." *Ibid.* "After a reasonable review of any matter raised," the plan sponsor must notify the employer of "(i) the plan sponsor's decision, (ii) the basis for the decision, and (iii) the reason for any change in the determination of the employer's liability or schedule of liability payments." 29 U.S.C. 1399(b)(2)(B).

MPPAA then provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under [29 U.S.C. 1381-1399] shall be resolved through arbitration." 29 U.S.C. 1401(a)(1). Either party may initiate arbitration within a 60-day period after the earlier of (1) 120 days after the date of the employer's request for review under 29 U.S.C. 1399(b)(2)(A), or (2) the date of notification to the employer of the plan sponsor's decision on the employer's request for review. See 29 U.S.C. 1401(a)(1).[3]

Pursuit of the foregoing statutory remedies does not, however, excuse the employer from making periodic payments as they become due in the meantime. To the contrary, the Act specifically provides that, "notwithstanding any request for review or appeal of determinations of the amount of [withdrawal] liability or of the schedule," the employer's withdrawal liability is "payable in accordance with the schedule set forth by the plan sponsor" beginning no later than 60 days after the date of the plan sponsor's demand. 29 U.S.C. 1399(c)(2). The same point is reiterated in 29 U.S.C. 1401(d), which provides

[3] The parties also may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under 29 U.S.C. 1399(b)(1). See 29 U.S.C. 1401(a)(1).

that "until the arbitrator issues a final decision with respect to the determination submitted for arbitration," the employer is required to make payments in accordance with the plan sponsor's schedule of payments, subject to "any necessary adjustments in subsequent payments for overpayments or underpayments" arising from the arbitrator's decision. If no arbitration proceeding has been initiated within the period prescribed by 29 U.S.C. 1401(a), "the amounts demanded by the plan sponsor under [29 U.S.C. 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor," and "[t]he plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection." 29 U.S.C. 1401(b)(1).

In the event of "default," "a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made." 29 U.S.C. 1399(c)(5). A PBGC regulation further provides that, upon default, a plan sponsor may require immediate payment of only a portion of the outstanding amount of the employer's liability. 29 C.F.R. 4219.31(b)(2).[4] If the plan sponsor chooses the latter course, the sponsor must establish a new schedule of payments for the remaining amount. *Ibid.*

The Act defines "default" to include "the failure of an employer to make, when due, any payment under [29 U.S.C. 1399], if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." 29 U.S.C. 1399(c)(5)(A); see also 29 C.F.R. 4219.31(b)(1)(i).[5] In addition, PBGC regulations

[4] Prior to July 1, 1996, regulations promulgated under MPPAA by PBGC appeared at 29 C.F.R. Pts. 2640-2677.

[5] The term "default" also includes "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an

set forth rules that apply to an employer's obligation to make withdrawal liability payments during the period for plan sponsor review and arbitration. In those instances, a default triggered by a failure to make payments does not occur until the sixty-first day after the last of (1) the expiration of the 90-day period within which the employer may request review under 29 U.S.C. 1399(b)(2)(A); (2) if review is requested within those 90 days, the expiration of the period within which arbitration may be initiated under 29 U.S.C. 1401(a)(1); or (3) if arbitration is timely initiated, the date the arbitrator issues a decision. 29 C.F.R. 4219.31(c)(1).[6]

MPPAA authorizes civil actions to enforce its various provisions. It provides that a plan fiduciary, employer, plan participant, or beneficiary "who is adversely affected by the act or omission of any party" under MPPAA with respect to a multiemployer plan "may bring an action for appropriate legal or equitable relief" in federal court. 29 U.S.C. 1451(a)(1) and (c). Such an action is barred, however, "after the later of—(1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action." 29 U.S.C. 1451(f).

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employer will be unable to pay its withdrawal liability." 29 U.S.C. 1399(c)(5)(B); see also 29 C.F.R. 4219.31(b)(1)(ii).

[6] Installments due before the expiration of the period described in 29 C.F.R. 4219.31(c)(1) must be paid in accordance with the schedule established by the plan sponsor. 29 C.F.R. 4219.31(c)(2). Any payment not so made is "overdue," and interest accrues from the date of the missed payment. *Ibid.*; see also 29 C.F.R. 4219.31(a), 4219.32(a)(1) and (d).

2. For several years, respondent Ferbar Corporation (Ferbar) contributed to the Bay Area Laundry and Dry Cleaning Pension Trust Fund (Fund). In March 1985, Ferbar ceased making contributions to the Fund. On December 12, 1986, the Fund sent Ferbar a notice assessing a withdrawal liability obligation of $45,580.80. Pet. App. 2a. The notice stated that Ferbar could discharge its withdrawal liability obligation by paying the total amount within 60 days of receipt of the letter, or by making monthly installment payments of $345.50 for 240 months (with a final payment of $344.96), beginning February 1, 1987. *Id.* at 2a-3a; Compl. ¶ 14; C.A. E.R. Tab 13. Ferbar made no payments in response to the Fund's demand.

In a letter dated February 27, 1987, Ferbar requested that the Fund review its assessment of withdrawal liability. In a letter dated April 14, 1987, the Fund notified Ferbar that its first payment was delinquent and that Ferbar had 60 days from the date of that notice to cure the delinquency, or it would be considered in default. Pet. App. 3a. Ferbar failed to cure its delinquency. In a letter dated April 28, 1987, however, Ferbar referred to its previous response and asked when the Fund's answer would be forthcoming. *Ibid.*; Br. in Opp. 6. In a letter dated July 8, 1987, Ferbar requested arbitration of its disputed withdrawal liability. Pet. 5. No arbitration proceedings were held, and Ferbar did not make any withdrawal liability payments. Pet. App. 7a; Br. in Opp. 6.

On February 9, 1993, petitioner, the Board of Trustees of the Fund, filed a complaint against Ferbar and its principal shareholder, Stephen J. Barnes, in the United States District Court for the Northern District of California to collect the employer's withdrawal liability.[7]

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[7] Petitioner also sued Ferreira Farms, Inc., and Diablo Cleaners, Inc., two dry cleaners, and Robert J. Ferreira, a shareholder in Ferreira Farms, Diablo Cleaners, and Ferbar. Compl. ¶¶ 7-10. On

The parties filed cross-motions for summary judgment on whether the statute of limitations had expired. Pet. App. 6a-7a. On May 9, 1994, the district court granted summary judgment in favor of respondents. *Id.* at 6a-19a. The court first held that the suit was barred by the three-year limitations period set forth in 29 U.S.C. 1451(f)(2), because "plaintiffs knew a cause of action existed no later than 1987, yet filed their complaint in excess of three years of that time." Pet. App. 11a (citation omitted). In the alternative, the court held that the Fund's action was barred by the six-year limitations period set forth in 29 U.S.C. 1451(f)(1). Pet. App. 11a-18a. The court reasoned that the Fund was "adversely affected when the first monthly payment was not made" by the February 1, 1987 due date and, therefore, that the Fund's "cause of action arose and, concomitantly, the statute of limitations began running," on February 1, 1987. *Id.* at 13a. Because February 1, 1987, "preced[ed] the filing of the lawsuit by more than six years," the court concluded that the action was time-barred. *Id.* at 18a.

3. The court of appeals affirmed, but on different grounds. Pet. App. 1a-5a. The court of appeals first held that the district court erred in relying on the three-year limitations period set forth in 29 U.S.C. 1451(f)(2). The court explained that "[t]he district court misread the plain language of [29 U.S.C.] 1451(f), which clearly directs courts to apply 'the later of' the two periods of limitations." Pet App. 3a. "On the facts of this case," the court concluded, the later limitations period "is six years from the date the cause of action arose." *Ibid.*

Turning to the district court's alternative holding that the Fund's cause of action became time-barred six years after February 1, 1987, the date on which the employer

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June 3, 1994, those defendants were dismissed from the complaint. C.A. E.R. Tab 31.

drawal liability as required by the Act. And, unless a plan sponsor accelerates the entire debt following an employer's default, the plan sponsor has a separate cause of action on the date each payment becomes due. That is the usual rule for installment payments in other settings, and there is no reason for a different rule under MPPAA.

In this case, beginning on February 1, 1987, respondent failed to pay its monthly withdrawal liability installments as required by the plan sponsor's schedule, and respondent's debt has not been accelerated under the Act. Thus, petitioner's complaint, filed February 9, 1993, is time-barred with respect to respondent's first missed installment payment on February 1, 1987, but is timely with respect to installment payments falling due thereafter.

A. A Plan Sponsor's Cause of Action For Collection of Withdrawal Liability Arises on The Date The Employer Fails to Make a Withdrawal Liability Payment

1. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); see also *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *United States* v. *Morton*, 467 U.S. 822, 828 (1984). Thus, "when a 'cause of action' first 'accrues'" for purposes of a statute of limitations must be determined "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co.* v. *Koons*, 271 U.S. 58, 62 (1926)). It is also settled that statutes of limitations do not begin to run until there is "a complete and present cause of action."

Rawlings v. *Ray*, 312 U.S. 96, 98 (1941);[8] see also *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874) ("All statutes of limitation begin to run when the right of action is complete[.]"). "A cause of action is created when there is a breach of duty owed the plaintiff." *Unexcelled Chem. Corp.* v. *United States*, 345 U.S. 59, 65 (1953). See also *United States* v. *Lindsay*, 346 U.S. 568, 569 (1954) ("a right accrues when it comes into existence").

MPPAA authorizes a plan fiduciary to file suit whenever the plan is "adversely affected by the act or omission of any party" and permits such suits to be filed within "6 years after the date on which the cause of action arose." 29 U.S.C. 1451(a) and (f)(1).[9] In an action by a plan sponsor to collect withdrawal liability payments, it is the employer's failure to make a scheduled payment that is the "act or omission" that "adversely affect[s]" the plan in the relevant sense and thus gives rise to the cause of action under Section 1451. Respondent argues (Br. in Opp. 14-15) that a plan sponsor's cause of action arises on the date of an employer's withdrawal because the fund is "adversely affected" by the withdrawal. Respondent points to a congressional finding under MPPAA that "withdrawals of

[8] In *Rawlings*, the Court held that a bank receiver's cause of action to collect an assessment by the Controller of the Currency against one of the bank stockholders accrued not on the date of assessment but "the date fixed for payment." 312 U.S. at 98. The Court explained that "the statute of limitations did not begin to run" until the debt was actually due because "prior thereto suit could not be maintained against him." *Ibid*.

[9] A suit also is timely under the Act if it is brought within "3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." 29 U.S.C. 1451(f)(2). Because Section 1451(f)'s time-bar applies "the later of" the periods set forth in Section 1451(f)(1) and Section 1451(f)(2), the six-year accrual provision applies in this case. Pet. App. 3a.

contributing employers * * * frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan." 29 U.S.C. 1001a(a)(4)(A). MPPAA addresses that very problem, however, by imposing withdrawal liability according to a prescribed formula and procedures. See 29 U.S.C. 1381, 1399; *Connolly* v. *PBGC*, 475 U.S. 211, 214-217 (1986). If the employer makes scheduled payments to the plan as required by the Act, the plan is not "adversely affected" within the meaning of 29 U.S.C. 1451(a). A plan is "adversely affected" under the statutory scheme, and a cause of action therefore accrues, only when the employer fails to make scheduled payments when they fall due.

"Withdrawal, in itself, does not visit any adverse effect upon the plan that gives rise to the cause of action," but "merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and payment." *Joyce*, 871 F.2d at 1123, 1124. That is so because an employer does not owe any withdrawal liability on the date of its withdrawal from the plan. See *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 423 (1995) ("[T]he statute makes clear that the withdrawing employer owes nothing until its plan demands payment.").[10] MPPAA provides that, "[a]s soon as practicable" *following* a withdrawal, the plan sponsor must establish a schedule of payments in accordance with the Act. 29 U.S.C.

[10] In *Milwaukee Brewery*, the pension plan argued that an employer's withdrawal liability payment schedule included interest for the year in which withdrawal occurred. In rejecting that contention, the Court observed that the "withdrawing employer's debt does not arise" at the time of withdrawal, because "the statute makes clear that the withdrawing employer owes nothing until its plan demands payment." 513 U.S. at 423.

1399(b)(1).[11] The first payment is not due until as much as 60 days after the plan sponsor sets that schedule. 29 U.S.C. 1399(c)(2); see 29 U.S.C. 1399(c)(1)(A)(i) ("Actual payment shall commence in accordance with paragraph (2)."). Thus, "MPPAA contemplates that an employer sometimes may pay its actual first installment long after the withdrawal year." *Milwaukee Brewery*, 513 U.S. at 426.

An employer's withdrawal by itself does not breach any statutory duty owed to the plan or violate MPPAA, and petitioner does not claim otherwise. Rather, petitioner filed suit to collect payments of statutory withdrawal liability that were not made. Thus, the employer's failure to pay its withdrawal liability, as required by 29 U.S.C. 1399(c)(1)(A)(i) and (c)(2), constitutes the breach of duty and the "violation giving rise to the action." *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989). Accordingly, it is not until an employer fails to pay its withdrawal liability when due that a plan sponsor is "adversely affected" by an "act or omission" of the withdrawing employer, 29 U.S.C. 1451(a), and it is only then that the plan sponsor has a cause of action to collect the withdrawal liability.

2. Under the Ninth Circuit's analysis, the statute of limitations always begins to run before the plan is entitled to file suit. The Ninth Circuit's decision is therefore inconsistent with the established principle that "the statute

[11] MPPAA imposes withdrawal liability only for the employer's allocable share of the plan's "unfunded vested benefits," which may be zero. 29 U.S.C. 1391(b). Moreover, other provisions of the Act reduce or eliminate the amount of the employer's withdrawal liability. For instance, in certain cases, withdrawal liability is not imposed for temporary contribution obligation periods, 29 U.S.C. 1390, and liability is reduced upon certain asset sales or the employer's insolvency, 29 U.S.C. 1405. See also 29 U.S.C. 1389 (de minimis rule).

of limitations will [not] be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman*, 119 U.S. 587, 602 (1887). See also *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute."); see generally 51 Am. Jur. 2d *Limitation of Actions* § 107 (1970) ("no limitation commences to run against any demand until the obligation or demand is due and payable, in the sense that it is defined sufficiently to be capable of enforcement").

Indeed, a rule that begins the statute of limitations at the time of withdrawal would effectively prevent plan sponsors from collecting any unpaid installment payments that may become due more than six years after the date of the employer's withdrawal. For example, under a withdrawal-accrual rule, a plan sponsor that received timely installment payments throughout the six years following the employer's withdrawal would be time-barred from bringing a collection action even if the employer thereafter ceased making payments in the seventh year. That result cannot be reconciled with the Act's express provision for a payment schedule that may extend as long as 20 years, 29 U.S.C. 1399(c)(1)(B), and would undermine MPPAA's "ultimate aim that workers receive pension payments which they have duly earned." *Joyce*, 871 F.2d at 1126. Thus, the limitations period in 29 U.S.C. 1451(f)(1) does not require plan sponsors to bring an action to collect withdrawal liability within six years following the employer's withdrawal from a plan.

3. The employer's failure to pay the sum due on a date certain as specified by the plan's schedule under 29 U.S.C. 1399(c)(2) is a discrete event. See also 29 C.F.R. 4219.31(a) ("a withdrawal liability payment is overdue if it is not paid on the date set forth in the schedule of payments established by the plan sponsor"). For that reason, a rule that commences a plan sponsor's collection action at the time of the employer's failure to pay is precisely the type of "firmly defined, easily applied rule[]" that a statute of limitations demands, *Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985) (quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)), and it furthers "[p]redictability, a primary goal of statutes of limitations." *Owens* v. *Okure*, 488 U.S. 235, 240 (1989).[12]

By contrast, tying the statute of limitations to the employer's withdrawal would make the threshold determination whether the limitations period has expired turn on the more complicated question whether and when an employer completely withdrew under the Act. Under MPPAA, an employer's "complete withdrawal" generally occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. 1383(a). "[T]he date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." 29 U.S.C. 1383(e). The determination whether and when a statutory withdrawal

[12] Although the employer may contest the plan sponsor's calculation of liability, 29 U.S.C. 1399(b)(2)(A), 1401(a), MPPAA requires the employer to pay the installments according to the plan's schedule pending the resolution of any dispute, see 29 U.S.C. 1399(c)(2), 1401(d); 29 C.F.R. 4219.31(c)(2). That "'pay now, dispute later' feature of MPPAA * * * functions to preserve plan cash flow and to thwart the use of dilatory tactics by employers." *Debreceni* v. *Merchants Terminal Corp.*, 889 F.2d 1, 5 (1st Cir. 1989) (quoting *Robbins* v. *Pepsi-Cola Metro. Bottling Co.*, 800 F.2d 641, 642 (7th Cir. 1986)).

has occurred, however, "cannot necessarily be made upon complete withdrawal; rather, it requires a post hoc determination of when a particular cessation of covered operations, for example, actually signaled a permanent halt to (rather than a lull in) operations." *Joyce*, 871 F.2d at 1123. Further, the Act provides that certain cessations of operations or obligations to contribute do not result in statutory withdrawals. For example, withdrawal does not occur upon an employer's sale of assets if certain statutory conditions are satisfied. See 29 U.S.C. 1384. Similarly, withdrawal does not occur if "an employer ceases to exist by reason of * * * a change in corporate structure" where the successor continues to contribute to the plan, or if "an employer suspends contributions under the plan during a labor dispute involving its employees." 29 U.S.C. 1398. A plan sponsor may also disregard any transaction a principal purpose of which "is to evade or avoid liability" under the Act. 29 U.S.C. 1392(c).

In addition, special rules apply to particular employers and plans. If a plan primarily covers work in the building and construction industry, a construction employer withdraws only if the employer ceases to have an obligation to contribute under the plan and either (1) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or (2) "resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." 29 U.S.C. 1383(b)(2)(B).[13] Employers in the entertainment industry

[13] Because a plan sponsor may not be able to determine whether a building and construction employer has withdrawn from a plan until five years after the time of withdrawal, the Ninth Circuit's decision in *Board of Trustees of Construction Laborers* v. *Thibodo*, 34 F.3d 914 (1994), cert. denied, 514 U.S. 1017 (1995), held that the limitations

that participate in plans primarily covering that industry are subject to similar provisions. 29 U.S.C. 1383(c).[14]

The treatment of entities under "common control" further compounds the uncertainty associated with the determination whether and when a withdrawal has occurred. Section 1301(b)(1) of Title 29, U.S.C., provides that "all employees of trades or businesses * * * under common control shall be treated as employed by a single employer." See 29 C.F.R. 4001.3. Thus, a plan sponsor must determine whether an employer is a member of a controlled group and, if so, whether the controlled group as a whole has effectuated a withdrawal under the Act. See generally *Robbins* v. *Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641, 648-660 (N.D. Ill. 1986).

Moreover, a plan sponsor may not securely rely on its own determination of when an employer's actions constitute a statutory withdrawal, for the plan sponsor's determination is subject to review by an arbitrator and then the courts. 29 U.S.C. 1401, 1451; cf. *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 630 (1993) (date of an employer's complete withdrawal is a "mixed question of fact and law"). Thus, the rule fashioned by the decision below would subject parties and the courts to needless litigation over when a cause of action under MPPAA arose, and would

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period for a suit against such an employer does not begin to run until "the statutory conditions for withdrawal are met." Pet. App. 28a-29a.

[14] In addition, if substantially all contributions to a plan are made by employers "primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry," withdrawal does not occur unless PBGC "determines that the plan has suffered substantial damage to its contribution base as a result of [an employer's cessation of operations or obligation to contribute]," or the employer fails to furnish a bond "in an amount equal to 50 percent of the withdrawal liability of the employer." 29 U.S.C. 1383(d).

"create, at the least, an unwieldy statutory collection mechanism." *Joyce*, 871 F.2d at 1124; cf. *Wilson*, 471 U.S. at 275 (assuming that "Congress intended the identification of the appropriate statute of limitations [under 42 U.S.C. 1983] to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation").

4. Accrual of a plan sponsor's collection action at the time of withdrawal is not necessary to advance the purpose of a statute of limitations to "put defendants on notice of adverse claims and * * * prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983); see also *Klehr* v. *Smith Corp.*, No. 96-663 (June 19, 1997), slip op. 6-7. MPPAA mandates that a plan sponsor notify the employer of the amount of its withdrawal liability and demand payment according to a schedule "[a]s soon as practicable" following the plan sponsor's determination that a complete withdrawal has occurred. 29 U.S.C. 1399(b)(1). A plan fiduciary further must discharge its duty "solely in the interest of the [plan's] participants and beneficiaries." 29 U.S.C. 1104(a)(1).

Because a plan fiduciary must act with reasonable promptness in notifying an employer of its withdrawal liability obligations under MPPAA, there is no force to the Ninth Circuit's concern (Pet. App. 27a) that a rule that defers accrual of a collection suit until after an unmet demand for payment "improperly places the running of the limitations period in the control of the plaintiff." A plan sponsor that unduly delays in notifying the employer of its liability "puts at risk the solvency of the plan and thus may invite a claim for breach of fiduciary duty." *Joyce*, 871 F.2d at 1126. The passage of time also makes it less likely that a plan fiduciary will be able to collect against insolvent or defunct employers, like respondent. See Br.

in Opp. 5. And, of course, the longer a plan sponsor waits to collect withdrawal liability, the less investment earnings the plan may obtain on the funds once collected.[15] In any event, it makes little sense to craft a rule of limitations predicated solely on the hypothetical possibility that a particular plan fiduciary might not comply with its statutory and fiduciary duties to protect the plan's interests. See *Central States Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 571 (1985) ("ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries"); cf. *FDIC* v. *Henderson*, 61 F.3d 421, 426 (5th Cir. 1995) ("the law usually presumes that directors will exercise their fiduciary duties"); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties"). Accordingly, the reasons advanced by the Ninth Circuit to support a withdrawal-accrual rule lack merit.[16]

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[15] In addition, some courts have held that an employer that is prejudiced by a plan sponsor's failure to demand withdrawal liability "as soon as practicable" following the employer's withdrawal may assert the plan sponsor's delay as a defense in arbitration. See, *e.g.*, *Joyce*, 871 F.2d at 1126-1127.

[16] The Ninth Circuit's decision in *Thibodo* also relied on MPPAA's three-year discovery-accrual provision, 29 U.S.C. 1451(f)(2). See note 9, *supra*. The Ninth Circuit believed that "[t]here is little reason" for the discovery-accrual provision "if the cause of action does not come into existence until demand for payment is made and refused." Pet. App. 28a. Like the claim-accrual provision in 29 U.S.C. 1451(f)(1), however, the discovery-accrual provision applies to any "act or omission of any party under [29 U.S.C. 1381-1453]." See 29 U.S.C. 1451(a). In addition to actions under MPPAA's withdrawal-liability provisions, 29 U.S.C. 1381-1405, MPPAA's time-bar applies to actions under the Act's provisions for mergers and other transfers of plan assets (29 U.S.C. 1411-1415), reorganization status and minimum contribution requirements

B. Petitioner's Cause of Action is Timely as to Payments Falling Overdue Within Six Years Before The Filing of The Complaint

1. Because a plan sponsor's cause of action does not arise on the date of the employer's withdrawal, the Ninth Circuit's decision affirming the dismissal of petitioner's complaint was in error. Petitioner filed its complaint on February 9, 1993, more than six years following the employer's first missed installment payment on February 1, 1987, but less than six years following the employer's next scheduled payment. The fact that petitioner did not file suit within six years after the employer's first missed payment on February 1, 1987, does not bar petitioner's suit insofar as it seeks to collect the remaining delinquent installments.

A plaintiff generally may recover damages caused by each statutory violation occurring within the limitations period. See, *e.g.*, *Klehr*, slip op. 8-9 (noting decisions under civil RICO); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (Clayton Act); *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (Title VII and Equal Pay Act); *Knight* v. *Columbus, Ga.*, 19 F.3d 579, 582 (11th Cir.) (Fair Labor Standards Act), cert. denied, 513 U.S. 929 (1994); *State Farm Mut. Auto. Ins. Co.* v. *Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (noting rule under Section 1983 actions). For example, in a plan fiduciary's suit against an employer for failure to make monthly contributions to a multiemployer plan in violation of 29 U.S.C. 1145, "[t]he limitations period runs against each monthly right of

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(29 U.S.C. 1421-1424), and benefits after termination of plans (29 U.S.C. 1441). Accordingly, because the discovery-accrual provision "extends to matters far beyond collection of withdrawal liability," that provision "retains independent significance" even if a collection suit accrues at the time of nonpayment. *Joyce*, 871 F.2d at 1125.

action separately." *Trustees for Alaska Laborers* v. *Ferrell*, 812 F.2d 512, 517 (9th Cir. 1987).[17] Similarly here, an employer that fails to pay any installment payment according to the schedule set forth by the plan sponsor, 29 U.S.C. 1399(c)(2), has violated MPPAA, and each missed payment by the employer constitutes a separate violation of the Act. A plan sponsor "adversely affected" by each missed payment thus has a separate cause of action under 29 U.S.C. 1451(a) with respect to that payment, and may "recover the payments due during the six years preceding the filing of its lawsuit." *Kahle Eng'g*, 43 F.3d at 857.

2. The law is well settled that, "[i]n the case of an obligation payable by instalments, the statute of limitations runs against each instalment from the time it becomes due," even though "the debtor has the option to pay the entire indebtedness at any time." 51 Am. Jur. 2d *Limitation of Actions* § 133 (1970); see also 1 C. Corman, *Limitation of Actions* § 7.2.9 (1991) ("Default on money obligations that are payable in installments creates a separate cause of action, with its concomitant statute of limitations, against each installment as it becomes due.").[18] Moreover, "where there is an acceleration clause

[17] MPPAA provides that, in any action "to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution [under 29 U.S.C. 1145]." 29 U.S.C. 1451(b); see also 29 U.S.C 1401(d). It therefore is especially appropriate that the same limitations rule should apply to delinquent contributions and delinquent payment of scheduled withdrawal liability installments.

[18] That principle applies whether the obligation is imposed by contract or by federal statute. See, *e.g.*, *Waggoner* v. *Dallaire*, 649 F.2d 1362, 1368 (9th Cir. 1981) (suit under Section 301(a) of Labor Management Relations Act (29 U.S.C. 1144) to collect delinquent monthly trust contributions); *Russell* v. *United States*, 314 F.2d 809, 811 (Ct. Cl. 1963) (suit to collect periodic pay claims under Officer Personnel Act of

giving the creditor the right upon certain contingencies to declare the whole sum due, the statute begins to run, only with respect to each instalment, at the time the instalment becomes due, unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option." 51 Am. Jur. 2d *Limitation of Actions* § 133 (1970); see also 1 Corman, *supra*, § 7.2.9; 4 A. Corbin, *Contracts* § 951 (1951); 18 S. Williston, *A Treatise on the Law of Contracts* §§ 2026C, 2027 (3d ed. 1978).[19]

Under those principles, unless a plan sponsor has elected to accelerate the employer's debt under 29 U.S.C. 1399(c)(5), a separate cause of action arises on the date each payment becomes overdue. In this case, respondent does not contend that its debt was accelerated by petitioner.[20] Accordingly, petitioner's suit to collect the February 1, 1987 missed payment is time-barred, but the

1947); *Davis* v. *Alabama Power Co.*, 383 F. Supp. 880, 893-894 (N.D. Ala. 1974) (suit for wages under Military Selective Service Act of 1967), aff'd, 542 F.2d 650 (5th Cir. 1976), aff'd, 431 U.S. 581 (1977); see also cases cited at note 19, *infra*.

[19] See, *e.g.*, *United States* v. *Dos Cabezas Corp.*, 995 F.2d 1486, 1490-1491 (9th Cir. 1993); *United States* v. *Alessi*, 599 F.2d 513, 515 (2d Cir. 1979); *Snyder* v. *Madera Broadcasting, Inc.*, 872 F. Supp. 1191, 1197 (E.D.N.Y. 1995); *RTC* v. *Koock*, 867 F. Supp. 284, 288 (E.D. Pa. 1994); *United States* v. *LaFrance*, 728 F. Supp. 1116, 1119-1120 (D. Del. 1990) (collecting authorities).

[20] The result in this case would be the same even if respondent's entire debt had been accelerated (notwithstanding respondent's pending request for arbitration, see 29 C.F.R. 4219.31(c)(1)), and even if the limitations period with respect to all remaining amounts due began to run on the first date on which petitioner was *authorized* to accelerate payments following a default. The earliest date on which petitioner could have accelerated respondent's entire liability was 60 days after respondent received petitioner's April 14, 1987 notice. 29 U.S.C. 1399(c)(5); see page 7, *supra*. That date was less than six years prior to petitioner's filing of its complaint.

complaint is timely filed as to all missed installment payments falling due thereafter. Cf. Compl. ¶¶ 26, 27 (seeking the entire amount of withdrawal liability or, alternatively, the amount of the delinquent monthly payments owed between February 1987 and the time of trial).

In ruling to the contrary, the court below reasoned that because respondent "never agreed to the installment plan proposed by the Fund and made no installment payments," respondent did not enter into a "new contract to pay off the withdrawal liability." Pet. App. 5a n.4; see also *Navco*, 3 F.3d at 172 ("the employer did *not* assent to a longer [installment] period for payment and suit"). An employer's lack of consent, however, cannot overcome MPPAA's express statutory command that an employer discharge its withdrawal liability debt "in * * * equal installments." 29 U.S.C. 1399(c)(3). Those installments may extend as long as 20 years. 29 U.S.C. 1399(c)(1)(B). This Court has explained that the "installment method" of payment furthers MPPAA's goal of "maintaining level funding for the plan." *Milwaukee Brewery*, 513 U.S. at 418-419. Thus, unless the employer prepays its withdrawal liability debt, 29 U.S.C. 1399(c)(4), MPPAA does not permit an employer to opt out of its installment obligations.

Similarly, the notion that a fund has "only one *claim* against the employer," *Navco*, 3 F.3d at 172, is inconsistent with the provisions of MPPAA relating to default and acceleration. A plan sponsor may "require immediate payment of the outstanding amount of an employer's withdrawal liability" only "[i]n the event of a default." 29 U.S.C. 1399(c)(5). Default does not occur under the Act unless the failure to pay is not cured by the employer within 60 days after it receives written notification from the plan sponsor that payment is overdue. 29 U.S.C. 1399(c)(5)(A); 29 C.F.R. 4219.31(b)(1)(i). Moreover, default "shall not occur" until as much as 60 days after arbitration has concluded. 29 C.F.R. 4219.31(c)(1). Thus, unless the employer has failed after 60 days to cure a prior delinquency, and until the period in which arbitration may occur has passed, the plan sponsor may neither demand payment for the entire outstanding amount of the employer's withdrawal liability nor bring a collection suit under the Act for the full amount. Given those restrictions on demanding payment of the entire amount of unpaid liability, a cause of action to recover the entire amount of withdrawal liability cannot arise under 29 U.S.C. 1451(f) at the time of the employer's first missed installment payment. See *Borer*, 119 U.S. at 602; cf. *Crown Coat*, 386 U.S. at 511-512 (government contractor's claim for equitable adjustment under six-year limitations period, 28 U.S.C. 2401(a), accrued only after exhaustion of administrative appeals because only then could contractor file suit in court).[21]

For the foregoing reasons, unless a plan sponsor has accelerated payment of the employer's entire debt following the employer's default, the plan sponsor's cause of action does not run with respect to all installment payments on the date of the first missed payment. Petitioner's suit is therefore timely as to all missed installments falling due within the limitations period.

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[21] Even upon the employer's default, the outstanding amount of the withdrawal liability is not "presumptively due at the outset" (*Navco*, 3 F.3d at 172), because the Act places the decision to accelerate some or all of the outstanding liability within the discretion of the plan sponsor. 29 U.S.C. 1399(c)(5); 29 C.F.R. 4219.31(b)(2). Indeed, a rule that imposes an "[a]utomatic default on the entire balance from the date of the first missed payment discourages amicable resolution of disputes and discourages reentry into the fund as a contributing employer." *Kahle*, 43 F.3d at 859.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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